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in both cases it is inequitable for the victor to retain his advantage.¹⁷ The second objection is more serious. It is to be noted, however, that before relief is granted on the ground of perjury it is required that the plaintiff have a meritorious defense and that he clearly establish the perjury.¹⁸ Consequences are not always conclusive against a rule of positive law;¹⁹ and here the equity of the case is clear.

It is said that the refusal to enjoin the enforcement of judgments on the ground of perjury is a necessary choice between the evils of injustice in individual cases and the encouragement of vexatious litigation.²⁰ But a party seeking redress is required to exhaust first his legal remedies,²¹ to be free from fault,²² and clearly to establish the perjury²³ without which judgment would not have gone against him.²⁴ It is submitted that with these safeguards against undue litigation the lesser evil is to follow the equity of the matter.

CONDITIONS AGAINST ALIENATION IN INSURANCE POLICIES. — The standard form insurance policies usually provide for avoidance by alienation in one of three ways: (1) by a condition against "sale" or "conveyance," etc.; (2) by a condition against "sale, transfer, or change in title"; (3) by a condition against "change in title or interest." Such conditions, when any doubt arises, are rightly to be construed against the underwriter; although even this latitude is sometimes exceeded by the courts.

To violate the condition against "sale" there must be a parting with all the interest of the assured: if he retains any interest which amounts to an insurable one, the policy is not forfeited.¹ So where the assured conveys property, reserving to himself a life estate, there is no "sale."² Nor is the condition violated by a change of interest as between the partners of a firm, whether one partner withdraws³ or a new one is admitted.⁴ And it has even been held that a sale by the assured of all his interest to the holder of an outstanding tax title who immediately reconveyed the fee was not within the prohibition of the condition, because only a nominal sale.⁵

The condition against "change in title" is construed equally unfavorably to the underwriters. It is violated by transfers between partners,⁶ and by a conveyance to a third party in trust for the assured,⁷ but not by the execu-

¹⁷ *Barnesley v. Powel*, *supra*.

¹⁸ *Briesch v. McCauley*, 7 Gill (Md.) 189. In North Carolina conviction of perjury is required. *Peagram v. King*, 9 N. C. 295.

¹⁹ *Greene v. Greene*, *supra*.

²⁰ *United States v. Throckmorton*, *supra*.

²¹ *Mo. Ry. Co. v. Hoereth*, 144 Mo. 136; *Ponder v. Cox*, 26 Ga. 485.

²² *Carney v. Marseilles*, 136 Ill. 401; *Jewett v. Dringer*, *supra*.

²³ *Glover v. Hedges*, 1 N. J. Eq. 113.

²⁴ *Bloss v. Hull*, 27 W. Va. 503.

¹ *Grable v. German Ins. Co.*, 32 Neb. 645.

² *Clinton v. Insur. Co.*, 176 Mass. 486. See *Lane v. Maine Mutual Fire Ins. Co.*, 12 Me. 44.

³ *Powers v. Guardian Ins. Co.*, 136 Mass. 108; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405. The plaintiff recovered for the entire loss.

⁴ *Blackwell v. Ins. Co.*, 48 Oh. St. 533. In this case the court intimated that the amount of the recovery would be limited to the interest retained by the assured.

⁵ *Kyte v. Insur. Co.*, 144 Mass. 43.

⁶ *Hathaway v. Ins. Co.*, 64 Ia. 229. See *Oldham v. Fire Ins. Co.*, 90 Ia. 225.

⁷ *Ins. Co. v. Jensen*, 56 Neb. 284.

tion of a mortgage by the assured.⁸ Thus it appears that the expressions "sale" and "change in title" are construed in their popular rather than in their technical meanings; for common-law mortgages and nominal sales, though technically changes in title, are not popularly regarded as such.

A "change in interest" within the meaning of the condition may be the creation of an equity against the land, as when the assured contracts to convey.⁹ And it has been decided that the death of the assured¹⁰ or the delivery of a deed in escrow will have a like effect.¹¹ But this condition is not always so literally construed. A mortgage by the assured, for instance, is not considered a "change in interest";¹² and a transfer by one partner to his copartners has been treated in the same manner.¹³ Here, also, a sale which is merely nominal does not avoid the policy.¹⁴

The purpose of these conditions is to prevent any temptation to the assured to destroy the insured property when his actual interest is less than the face of the policy. Accordingly, it has been suggested as a test of what change of interest will avoid the policy, that there must be an actual diminution in the interest of the assured. So, when a mortgagee, after insuring, acquires the absolute title, that increase of interest is not within the condition.¹⁵

In a recent case a policy issued to the mortgagor was payable to the mortgagee, who, under a power of sale, conveyed the property to himself. This was held to violate the condition against sale. *Boston Coöperative Bank v. American Cent. Ins. Co.*, 87 N. E. 594 (Mass.). Such a result does not accord with the authorities.¹⁶ Practically, if not technically, the sale to the mortgagee was only a foreclosure, and, though the interest of the assured mortgagor was diminished, the diminution was not such as to tempt him to destroy; hence it should not have avoided the policy. Although extreme in some instances, the decisions show a decided leaning toward liberality of construction. And since the courts generally decline to interpret these conditions literally, the only rule to be laid down is that liberality of construction should be confined within the spirit of the condition, as gathered from the document as a whole.¹⁷

⁸ *Judge v. Ins. Co.*, 132 Mass. 521; *Jackson v. Ins. Co.*, 23 Pick. (Mass) 418. See also *Barry v. Fire Ins. Co.*, 110 N. Y. 1. But on foreclosure the condition is broken. *Commercial Union Assur. Co. v. Scammon*, 102 Ill. 46.

⁹ *Gibb v. Insur. Co.*, 59 Minn. 267.

¹⁰ *Hine v. Woolworth*, 93 N. Y. 75.

¹¹ *Excelsior Co. v. Western Assur. Co.*, 135 Mich. 467.

¹² *Sun Fire Ins. Co. v. Clark*, 53 Oh. St. 414. *Contra*, *Edmands v. Mutual Ins. Co.*, 1 Allen (Mass.) 311.

¹³ *West v. Insur. Co.*, 27 Oh. St. 1.

¹⁴ *German Insur. Co. v. Gibe*, 59 Ill. App. 614.

¹⁵ *Bailey v. Am. Cent. Ins. Co.*, 13 Fed. 250.

¹⁶ *Kane v. Ins. Co.*, 38 N. J. L. 441; *Chamberlain v. Ins. Co.*, 3 N. Y. Supp. 701.

¹⁷ *Cf. Eaton v. Brown*, 193 U. S. 411. This case is, however, distinguishable on the ground that it involved a will, in which by necessity a greater liberality of construction prevails.